Supreme Court, U.S.
FILED

01 121 JUL 16 2001

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association, *et al.*,

Petitioners,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO PLC; B.A.T. INDUSTRIES PLC; BRITISH AMERICAN TOBACCO INVESTMENTS LIMITED, formerly known as BRITISH AMERICAN TOBACCO COMPANY LIMITED; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE RESEARCH-USA, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.; UNKNOWN CORPORATIONS A-Z,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Where petitioners have suffered injury in their business as a foreseeable result of respondents' conspiracy in violation of RICO and antitrust statutes, where petitioners are the first victims in the causal chain to suffer economic injury, and where no other proper plaintiff has been identified, do petitioners have standing to pursue RICO and antitrust claims against respondents?

2. Petitioner public hospital districts are required by statute to provide "charity" and other health care regardless of a patient's ability to pay. Respondent tobacco companies' conspiracy – in violation of RICO, the Sherman Act and state law – compelled the public hospital districts to provide millions of dollars in unreimbursed care that would not have been necessary "but for" the conspiracy. If petitioners were injured by defendants' conspiracy, must their claims be dismissed for lack of standing solely because of the absence of a "direct link" between defendants' wrongdoing and petitioners' damages?

3. In determining standing under RICO and antitrust statutes, is the availability of state law tort claims to other victims of defendants' conspiracy grounds for denying standing to a party under federal RICO and antitrust statutes, where denial of standing would leave no plaintiffs having standing to pursue these federal RICO and antitrust claims?

PARTIES

The following parties (collectively referred to in this petition as Public Hospital Districts or petitioners) were appellants below and are petitioners here: Association of Washington Public Hospital Districts, a Washington unincorporated association; Adams County Public Hospital District No. 2; Adams County Public Hospital District No. 3; Affiliated Health Services, a general partnership of Skagit County Public Hospital District No. 1 and Skagit & Whatcom Counties Public Hospital District No. 304; Chelan County Public Hospital District No. 2; Clallam County Public Hospital District No. 1; Clallam County Public Hospital District No. 2; Douglas, Grant, Lincoln, Okanogan Counties Public Hospital District No. 6; Ferry County Public Hospital District No. 1; Garfield County Public Hospital District; Grant County Public Hospital District No. 1; Grant County Public Hospital District No. 2; Grant County Public Hospital District No. 3; Grays Harbor County Public Hospital District No. 1; Jefferson County Public Hospital District No. 2; Kennewick Public Hospital District; King County Public Hospital District No. 1; King County Public Hospital District No. 2; Kittitas County Public Hospital District No. 1; Lewis County Public Hospital District No. 1; Mason County Public Hospital District No. 1; Okanogan and Douglas Counties Public Hospital District No. 1; Okanogan County Public Hospital District No. 3; Okanogan County Public Hospital District No. 4; Pacific County Public Hospital District No. 2; Pacific County Public Hospital District No. 3; Pend Oreille County Public Hospital District No. 1; Prosser Public Hospital District; Skagit County Public Hospital District No. 1; Skagit County Public Hospital District No. 2; Skagit and Whatcom Counties Public Hospital District No. 304; Snohomish County Public Hospital Dis-

trict No. 1; Snohomish County Public Hospital District No. 2; Snohomish County Public Hospital District No. 3; Whitman County Public Hospital District No. 1-A; and Whitman County Public Hospital District No. 3.

The following parties (collectively referred to in this petition as Tobacco Companies or respondents) were appellees below and are respondents here: Philip Morris Incorporated; RJ Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; British American Tobacco Plc; B.A.T. Industries PLC; British American Tobacco Investments Limited, formerly known as British American Tobacco Company Limited; Lorillard Tobacco Company; Liggett Group, Inc.; Liggett & Myers, Inc.; United States Tobacco Company; The Tobacco Institute Research-USA, Inc.; Smokeless Tobacco Council, Inc.; Hill & Knowlton, Inc.; Unknown Corporations A-Z.

CORPORATE DISCLOSURE STATEMENT

The Association of Washington Public Hospital Districts is an unincorporated association whose members – who are also petitioners – are municipal governments of Washington State. Because petitioners are nongovernmental corporations, there are no parent corporations to be disclosed under Rule 29.6.

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IV. OPINIONS BELOW

Petitioner Public Hospital Districts ask the Supreme Court to grant a Writ of Certiorari to the Ninth Circuit Court of Appeals to review the Ninth Circuit's decision (the Ninth Circuit Decision) dated February 22, 2001, captioned *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, No. 00-35117.

This action was originally commenced in the United States District Court for the Western District of Washington, captioned as Association of Washington Public Hospital Districts, *et al.*, v. Philip Morris Incorporaed, *et al.*, No. C98-1675. Defendants moved for dismissal of all of plaintiffs' claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On December 13, 1999, the district court granted defendants' motion to dismiss. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999).

Petitioners appealed. The Ninth Circuit affirmed. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2000). The Public Hospital Districts filed a petition for rehearing and rehearing en banc. The Ninth Circuit denied these requests on April 16, 2001. Copies of the Ninth Circuit Decision and related papers are included in the Appendix.

V. JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered on February 22, 2001. The Ninth Circuit denied a timely petition for rehearing and rehearing en banc on April 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

This petition concerns the Public Hospital Districts' claims brought under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Sherman Act. In pertinent part, RICO provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. 1962.

RICO provides a private cause of action with treble damages and attorneys fees for private attorneys general bringing such claims:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. 1964(c).

In pertinent part, the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. §1.

The Sherman Act also provides a private cause of action with treble damages and attorneys fees for private attorneys general:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15(a).

VII. STATEMENT OF THE CASE

A. Overview of the Case.

The Public Hospital Districts are political subdivisions of the state of Washington which are statutorily required to provide health care – including "charity care" – regardless of patients' ability to pay. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 700. Respondents are corporations not domiciled in the state of Washington which manufacture and market tobacco products or assist others in doing so. Petitioners filed suit against respondents in federal district court under 28 U.S.C. §1332 (diversity of citizenship), 28 U.S.C.

§1331 (federal question), and 28 U.S.C. §1337(a) (original question).

The Public Hospital Districts allege that over the last half century the Tobacco Companies have engaged in a pattern of extraordinary misconduct. The upshot of petitioners' allegations includes the following facts:

- respondents learned their products were both lethal and addictive decades earlier than smokers, health providers or others;
- respondents' own documents show they understood they were eseentially "in the business of selling nicotine, an addictive drug" and that removal of nicotine from the product would "eventually liquidate our business";
- less than three percent of the seventy percent of smokers who want to quit each year succeed, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 169 (2000) (Breyer, J., dissenting) (citing FDA findings);
- respondents understood, as a Brown & Williamson document put it, that "very few consumers are aware of the effects of nicotine, i.e., its addictive nature":
- respondents conspired to misrepresent and conceal the addictive nature of nicotine and the health risks associated with tobacco use;
- respondents conspired to suppress the creation of less harmful alternatives to their products (such as Nicorette gum and nicotine patches) in part because they feared development by hospitals and others of successful smoking cessation programs;
- respondents viewed health advice from medical providers, such as the Hospital Districts, and

effective smoking cessation products or other treatment programs, as direct competition;

- smoking causes lung cancer, emphysema, stroke, and other diseases and accounts for the premature death of more than 400,000 Americans annually;
- Public Hospital Districts are statutorily required to provide care – including "charity care" – to patients, without regard to patients' ability to pay;
- petitioners provided millions of dollars each year in unreimbursed care – above and beyond what they otherwise would have provided – as a result of respondents' misconduct;[1]
- respondents understood that proper use of their products would and did result in significant amounts of health care being rendered to smokers that otherwise would have been unnecessary; and
- respondents understood that some of this health care would be provided by entities such as petitioners, who would bear the expenses of such health care.

In short, respondents conspired to conceal that smoking is a disease of addiction (not merely a "bad habit" to be kicked) and to deny health providers such as the Public Hospital Districts the tools to treat this disease (e.g., Nicorette gum and nicotine patches). For decades, the conspiracy succeeded. As the editorial board of the

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[1] Even as it dismissed similar claims of union welfare plans, the Third Circuit conceded, "At this point in contemporary history, there can be little doubt that the tobacco companies' products have caused smokers to contract certain illnesses and that the plaintiff Funds (and others) have borne some of the costs of these illnesses . . . ." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999) ("*Steamfitters*").

Journal of the American Medical Association declared: "the evidence is unequivocal – the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence." *The Brown & Williamson Documents: Where Do We Go From Here?*, 274 JAMA 256, 258 (July 19, 1995).

However, once the Public Hospital Districts learned that smoking was a disease and obtained the tools to treat it, they were able to begin lowering treatment costs. But for the conspiracy, the Public Hospital Districts would have treated patients for nicotine addiction years earlier, avoiding millions of dollars in treatment costs for smoking.

It is important to note that petitioners do not seek to stand in the shoes of smokers or to bring smokers' claims in some derivative capacity. **Petitioners seek damages only for care for which they were never reimbursed by smokers.** In other words, Public Hospital Districts are the first party in the causal chain who suffered the economic injury for which they seek compensation.

B. Procedural History.

Petitioners sought relief for respondents' misconduct under several different theories, including two RICO and two Sherman Act counts. Respondents moved for dismissal of all claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted respondents' motion. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999).

Petitioners appealed and the Ninth Circuit affirmed, holding that they lacked standing to bring antitrist and RICO claims because their injuries were not proximately

caused by respondents' conduct. The court based this conclusion, as a threshold matter, on the lack of a "direct link" between respondents' misconduct and petitioners' injuries. After deciding that petitioners lacked standing on this ground alone, the Ninth Circuit "then applied the three-factor" test articulated by this Court in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") and *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and found that each of these factors weighed against granting standing to petitioner Public Hospital Districts. *Id.* at 702-703. The court also dismissed petitioners' remaining state law claims for lack of proximate cause. *Id.* at 707.[2]

The Ninth Circuit also dismissed petitioners' antitrust claims for failure to allege an antitrust injury. The court found that petitioners simply were not participants in the same market as the malefactors. *Id.* at 704-05. The court similarly dismissed petitioners claim under the Washington Consumer Protection Act, finding that petitioners had not been injured in their "business or property" within the meaning of that statute. *Id.* at 705-06 and that respondents' conduct had not proximate caused petitioners' injuries.

By holding that the Public Hospital Districts lack standing, the Ninth Circuit has now foreclosed the possibility that any party may hold tobacco defendants accountable for their RICO or antitrust violations. If this result stands, none of the logical parties in the chain

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[2]Petitioners seek certiorari and reversal of the Ninth Circuit Decision on proximate cause as it relates to all of their claims. However, for the sake of consistency, petitioners will follow the Ninth Circuit's lead in discussing proximate cause only in the RICO and antitrust context.

of causation – smokers, direct health care providers or third-party payors – have standing to bring RICO or antitrust claims.

VIII. REASONS FOR GRANTING THE WRIT

A. The Petition Raises an Important Federal Question About Standing for RICO and Antitrust Plaintiffs.

However the Court resolves the issues presented in this case, the outcome will have sweeping ramifications. The impact on litigants and potential litigants in tobacco cases alone will be enormous.

More significantly, in clarifying – or declining to clarify – what approach should be used in determining standing under RICO and antitrust statutes, this Court's decision will have an impact that far transcends the tobacco litigation. Courts, potential private attorneys general, and potential RICO and antitrust defendants will know whether racketeers and conspirators can escape RICO and antitrust liability altogether in certain types of cases, no matter how foreseeable the harm to their victims.

If the record remains that Tobacco defendants' long-standing conspiracy in violation of RICO and the antitrust laws is beyond challenge because no party has standing, it will breathe new life into the observation of Mark Twain's character, Pudd'nhead Wilson: "A crime perservered [over a long time] ceases to be a crime, and becomes a virtue. This is the law of custom and custom supercedes all other law."

1. This Petition Presents Questions of Great Importance to Potential Plaintiffs and Defendants in Future RICO and Antitrust Actions.

This Court has played a very active role in shaping standing analysis under federal antitrust and RICO statutes[3] and has carefully avoided adopting a black-letter rule for determining proximate cause. Now the Ninth Circuit has boldly gone where this Court has declined to go, adopting what could be called the Direct Link Test: If there is anyone between plaintiffs and defendants in the causal chain of events, plaintifffs lack standing,[4] even if that intervening party itself cannot bring antitrust or RICO claims due to the nature of his or her injuries. Moreover, the Ninth Circuit has substantially altered this Court's analysis by equating state tort law claims with RICO and antitrust claims. Collectively, these holdings[5] fundamentally alter the proximate cause

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[3] *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

[4] Such a rule has an especially onerous impact on the health care industry, which is the largest industry in the country, accounting for 13.5 percent of the Gross Domestic Product in 1999. Marc Breslow, *Health Care Workers Confront Managed Care*, Dollars & Sense, January 1, 1999, 1999 WL 12230384. Under the Direct Link Test, health providers' claims will be disproportionately penalized because their fact patterns usually involved third parties – patients. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

[5] While other circuits reached the same result as the Ninth Circuit by committing some of the same errors, the Ninth Circuit is the most explicit in establishing what amounts to a new bright-line test. *See Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999) *reversed*, 2001 WL 535977 (D.C. Cir. 2001) ("*Service Employees*"); *Lyons*

[footnote continued]

landscape – not just on tobacco litigation, but in any civil antitrust or RICO case brought by private attorneys general. Petitioners respectfully submit that such a dramatic shift in the law should occur only with this Court's review and approval.

The Ninth Circuit's new approach marks such a deviation from this Court's analysis that this Court should take this case, whether or not it disagrees with this new approach. If this Court agrees with the Ninth Circuit, this Court should take this case and explicitly endorse the Ninth Circuit's holding, since the standard articulated by the Ninth Circuit does not appear in any of this Court's previous decisions. Conversely, if this Court believes the circuits erroneously articulated standing requirements for RICO and antitrust statutes, it should take this case for the benefit of all those plaintiffs – in tobacco cases or otherwise – who will otherwise be denied the right to pursue their claims.

2. The Impact on Tobacco Cases Alone Qualifies the Questions Presented as Important Federal Questions.

RICO and antitrust standing ramifications aside, this is no ordinary case. The number of parties, magnitude of damages, and nature of the misconduct make this case worthy of this Court's attention.

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v. Philip Morris, Inc., 225 F.3d 909 (8th Cir. 2000); *United Food and Commercial Workers Unions, Employers Health and Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000); *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir. 1999) ("*Teamsters*"); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) ("*Laborers Local*"); *Steamfitters*, 171 F.3d 912 (3d Cir. 1999); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000).

Number of affected parties. The sheer number of similiarly situated plaintiffs and potential plaintiffs in tobacco cases is staggering. From unreimbursed public providers, such as the Public Hospital Districts, to payors of health care necessitated by respondents' conspiracy, literally thousands of entities have been injured in their business by respondents' conspiracy. The plaintiffs and potential plaintiffs include numerous[6] public entities, such as public hospital districts, municipalities, and even the federal government.[7] This Court's decision to correct or to tolerate the circuits' new approach to RICO and antitrust standing will have a profound impact on the rights of dozens of current plaintiffs and innumerable potential plaintiffs, including the federal government.

Magnitude of damages. The damages at issue in this case and related cases are colossal and virtually without precedent in American jurisprudence. State governments ultimately settled their claims against the Tobacco Companies for roughly $200 billion, *Steamfitters*, 171 F.3d at 918 (internal citation omitted), and they are responsible for paying only a fraction of the health care costs that were incurred as a result of respondents' conspiracy. This Court has taken the magnitude of damages into consideration when granting certiorari in other cases where much less was in dispute. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n.7

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[6]Philip Morris's 10-Q dated May 12, 2000, states that as of May 1, 2000, there were approximately 50 health care cost recovery cases pending in the United States against Philip Morris. Plaintiffs in these actions include domestic and foreign governmental entities as well as non-governmental entities such as union health and welfare funds and Native American tribes.

[7]The federal government filed suit against the Tobacco Companies under RICO and other statutes on Sept. 22, 1999.

(1983) ("the damages claimed in this suit alone may amount to $100 million").

Nature of the misconduct. Finally, the nature of the alleged wrongs and harms warrants special consideration by this Court in determining whether to grant certiorari.

As one trial court noted:

> If the allegations are to believed, the defendants in this suit are responsible for one of the most colossal and reproachful frauds in the history of American society. If proven to be true, the allegations demonstrate that the defendants intentionally bargained away the lives and health of tens of millions of Americans for profit. While the law is forced to address allegations of malfeasance on a continual basis, rarely if ever have American courts been faced with allegations of fraud so nefarious in nature, so wide in scope, or so broad in impact.

Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999).

This Court has itself recognized that "the thousands of premature deaths that occur each year because of tobacco use" are "one of the most troubling public health problems facing our Nation today . . . ." *Food and Drug Admin. v. Brown & Williamson*, 529 U.S. at 125. Similarly, the Court acknowledges that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Id.* at 161. These deleterious health effects – and their attendant costs – could have been drastically reduced had respondents not illegally conspired and defrauded millions of people.

Of course, the unconscionable nature of respondents' underlying conduct does not alone mandate a legal remedy for every aggrieved party. The questions pre-

sented regarding standing under RICO and the Sherman Act are difficult. But as Justice Thomas testified recently before a congressional committee: "It is on difficult issues that the Court is required to be the Court." Charles Lane, *Two Justices Defend Court's Intervention in Fla. Dispute,* Washington Post, March 30, 2001, at A13. Justice Kennedy similarly testified: "Sometimes it is easy to enhance your prestige by not exercising your responsibility, but that's not been the tradition of our Court." *Id.*

Instead, the tradition of the Court has been to address difficult issues squarely, whatever the outcome. "When contending parties invoke the process of the courts, . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush v. Gore,* 531 U.S. 98 (2000) (per curiam). The parties have invoked the process of the courts, and the claimed wrongs and harms are of historic proportions.

The difficult question is ripe for this Court to decide: can the Tobacco Companies be held responsible under RICO and the Sherman Act for the billions of dollars in increased medical costs foreseeably created by their conspiratorial misconduct? The Ninth Circuit has held that individual smokers cannot bring antitrust and RICO claims because they have suffered only personal injuries, and that third-party payors (Union Trusts and Blue Cross/Blue Shield Plans) and direct health care providers (hospitals) cannot bring such claims because individual smokers intervene in the causal chain. Since the Public Hospital Districts are the last remaining plaintiff in the causal chain to have standing denied, the issue of whether any such party should have RICO or antitrust standing is now ripe.

B. The Lower Courts' Holdings Conflict with Decisions of This Court.

This Court has tread carefully through the minefield of proximate cause analysis,[8] deciding each case on its facts rather than slavishly employing any simple tests. Yet the Ninth Circuit has divined and adopted just such a test – the Direct Link Test. Furthermore, the Ninth Circuit Decision misapplied factors previously identified by this Court by equating tort claims with RICO and antitrust claims.

The result of the Ninth Circuit's approach is a sieve so fine that every potential plaintiff has now been screened out. Notwithstanding claims that constitute RICO and Sherman Act violations of historic proportions, the Ninth Circuit has held that no plaintiff – not smokers, not direct health care providers, not third-party payors – has standing to bring RICO and antitrust claims. In effect, "the result [of the Ninth Circuit's tobacco decisions] was the court leaving a very real injury unremedied and immunizing extremely culpable defendants." Stasia Mosesso, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 Notre Dame L. Rev. 257, 259 (Nov. 2000). This surreal scenario – one never before created by this Court's decisions – underscores that something has gone fundamentally wrong in the lower courts' standing analysis.

To demonstrate how the Ninth Circuit Decision conflicts with those of this Court, it is helpful to review

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[8] "Any discussion of proximate cause should be approached with some trepidation because, as a scholarly treatise teaches, no topic is subject to more disagreement or such confusion." *Laborers Local*, 191 F.3d at 235 (internal citations and quotations omitted).

briefly (1) the congressional intent in enacting RICO and federal antitrust statutes, (2) this Court's standing rulings, and (3) the Ninth Circuit's standing analysis.

1. With RICO and the Sherman Act, Congress Created Powerful Tools for Private Plaintiffs to Deter Unscrupulous Conduct.

Much like the Ninth Circuit Decision, some circuits initially viewed the ability of private litigants to bring RICO claims quite narrowly. For example, one lower court believed that RICO was not intended to "provide additional remedies for already compensable injuries." *Sedima v. Imrex Co.*, 473 U.S. 479, 483 (1985) (quoting 741 F.2d 482, 494 (2d Cir. 1984)) (emphasis added). This Court disagreed:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, §904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity . . . . RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.

Id. at 497-98 (internal citations omitted).

Similarly, in creating private causes of action with treble damages under the antitrust statutes, Congress provided a means "not merely to compensate those who have been directly injured but also *to vindicate the important public interest in free competition.*" *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-02 (1969) (emphasis added). In language that

sounds almost prescient of the present case, this Court thus warned of

> the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. . . . *[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.*

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-39 (1968) (emphasis added).[9]

2. This Court's Proximate Cause Analysis Has Avoided Creating Bright-Line Tests or Situations Where RICO Violations Are Left Unremedied and Undeterred.

Notwithstanding the sweeping language and broad remedial nature of RICO and the Sherman Act, this Court has recognized limits to the statutes' reach. In

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[9] While both statutes are to be read broadly, certain legislative history suggests RICO should be construed even more broadly than the Sherman Act. RICO was originally introduced, in part, as an amendment to the Sherman Act. However, the Antitrust Section of the American Bar Association prepared a report on the proposed legislation "endorsing the principles and objectives" of the legislation, "but recommending that any such legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law." The ABA's recommendation, which was followed by Congress in enacting RICO, was based in part on concerns that private litigants proceeding under antitrust statutes would encounter "inappropriate and unnecessary obstacles" from "*a body of precedent – appropriate in a purely antitrust context – setting strict requirements on questions such as "standing to sue" and "proximate cause.*" 115 Cong. Rec. 6995 (1969) (ABA comments on S. 2048) (quoted in part in *Sedima*, 473 U.S. at 498).

particular, the Court has found that only those plaintiffs whose injuries were proximately caused by defendants' violation of these statutes have standing. *See, e.g., Holmes,* 503 U.S. at 265-66, 268.

Lack of bright lines. What is striking in reviewing this Court's leading decisions on proximate cause and standing is the calculated absence of any bright-line standard or strictly defined formula:

> [T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

AGC, 459 U.S. at 536 (quoted in part in *Holmes,* 503 U.S. at 274 n.20).

Balancing justice and administrative practicality. Ultimately, the factors identified by this Court faciliate the task of balancing of justice and administrative practicality: "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' *Holmes,* 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984). Or as Justice Andrews candidly put it in his famous *Palsgraf* dissent: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R.R. Co.,* 248 N.Y. 339, 351-52, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (quoted iwth approval by *AGC,* 459 U.S. at 537 n.34).

The search for proper plaintiffs. In applying the concepts of justice, public policy, and administrative practicality in the context of RICO and antitrust law, this Court has searched for the "proper plaintiffs," *see, e.g., Holmes,* 503 U.S. at 274, but has "*never* ruled that a plaintiff's injuries are too remove without first identifying a plaintiff who was more directly injured and better able to vindicate the law as a private attorney general." *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 86 (D.D.C. 1999), *reversed*, 2001 WL 535977 (D.C. Cir. 2001) ("*Service Employees*").

The point of sifting out some plaintiffs has been to preserve the potency of RICO and antitrust claims – not to render them impotent by denying standard to all potential RICO and antitrust plaintiffs. For example, "*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute – Section 4 of the Clayton Act – would result in no one plaintiff having a sufficient incentive to sue under that statute." *California v. ARC America Corp.*, 490 U.S. 93, 104 (1989) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)). Similarly, in *Hanover Shoe*, this Court recognized standing for a shoe manufacturer where it feared that individual consumers

> would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopoloizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

392 U.S. 481, 494 (1968).

3. The Circuits Have Misapplied This Court's Analysis and Have Added Standing Requirements That Conflict with This Court's Decisions.

a. The Ninth Circuit Direct Link Test Creates a Bright-Line Standard Where This Court Has Declined to Create Such a Standard.

The Ninth Circuit has taken the concept of directness quite literally. In ruling on the Public Hospital Districts' claims, the Ninth Circuit looked to its ruling in *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), which it summarized in this way:

> [T]he trusts' injuries were entirely derivative in nature, for "without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." Thus, *there was no "direct link" between the defendants' alleged wrongdoing and the trusts' damages, and the proximate cause requirement was not met.*

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 702 (9th Cir. 2000) (quoting *Oregon Laborers*, 185 F.3d at 964) (emphasis added). Only after concluding plaintiffs lacked standing based on the absence of a "direct link" alone did the lower court turn to the factors identified by this Court in *AGC* and *Holmes* – almost as an afterthought. *Id.* ("We then applied the three-factor AGC/Holmes proximate cause test").

The Ninth Circuit's test creates an appealingly bright line: If there is anyone between plaintiffs and defendants in the causal chain of events, plaintiffs lack standing.

This is true, even if plaintiffs are the first victim in the causal chain to suffer cognizable RICO and antitrust economic injuries. Had this Court adopted such a bright-line approach, it could have saved itself much of the analysis set forth in *Holmes* and *AGC*. Instead, as discussed above, this Court declined to "announce a black-letter rule . . ." and focused instead on identifying factors that should guide lower courts' analysis. *AGC*, 459 U.S. at 536. Noting that "[s]ome courts have focused on the directness of the injury," this Court cautioned against mechanical application of the very notion on which the Ninth Circuit has now seized: "In our view, courts should analyze each situation in light of the factors set forth in the text *infra*." *AGC*, 459 U.S. at 537 n.33; *cf. Holmes*, 503 U.S. at 274 n.20 ("our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text").

b. The Ninth Circuit's Direct Link Test Conflicts with This Court's Holding in *NOW v. Scheidler*.

Not only has this Court eschewed the kind of black-letter rule created by the Ninth Circuit, but its holdings clearly conflict with such a rule. In *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ("*NOW*"), for example, plaintiffs' RICO claims hinged on the fact that defendants' conduct had an impact on others (patients and employees of the clinic), whose conduct harmed plaintiff in its business. If defendants are the first link in the causal chain in *NOW*, patients and employees of the clinics are clearly the second link. The plaintiff clinics are relegated to the status of third link, connected to defendants only by the impact defendants'

conduct had on patients and employees, whose reaction to defendants' conduct resulted in foreseeable harm to plaintiff clinics.

Under the Ninth Circuit's Direct Link Test, the plaintiff clinic's claim in *NOW* would be quickly and easily dismissed: there is no "direct link" between defendants' wrongdoing and plaintiff's harm. The same is true of a number of other cases in which lower courts have granted standing to indirectly injured plaintiffs. *See, e.g., Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995) (Easterbrook, J.) ("there is no doubt that a producer injured by a campaign of misinformation directed at its customers suffers an injury compensible under the laws of torts"); *Pharmacare v. Caremark*, 965 F. Supp. 1411, 1421 (D. Hawaii 1996) (outpatient therapy center had standing to bring RICO claims for injuries it suffered as a result of a competitor's illegal efforts to obtain patient referrals; "Defendants' alleged perpetration of fraud on its patients could foreseeably affect the Plaintiffs"); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774 (1987) (although "a loss of consortium action is dependent on the occurrence of an injury to another, the claimant suffers an original injury that is the subject of the action").

c. Contrary to the Ninth Circuit, This Court Does Not Believe That Tort Claims Are an Adequate Substitute for RICO or Antitrust Remedies.

Compounding its error, when the Ninth Circuit finally considered the *AGC/Holmes* factors, it misapplied this Court's analysis. This Court has looked to whether there are more directly harmed victims who can and will

bring *RICO or antitrust claims.* The Ninth Circuit looked to whether there were more directly harmed victims who could bring *any kind of claim at all,* thus completely blurring the distinction between RICO or Sherman Act claims and garden-variety tort claims.

The Ninth Circuit denied standing to petitioners, in part,

> because there existed more directly injured victims, in the form of the smokers themselves, who would be motivated to punish the defendants for their wrongdoing. . . . *Although smokers could not vindicate the public interest in antitrust [or RICO] enforcement, they could bring other claims to deter the defendants' wrongdoing.*

Ass'n of Wash. Pub. Hosp. Dists., 241 F.3d at 702 (quoting *Oregon Laborers* at 964) (internal citations omitted) (emphasis added).

In considering the standing of plaintiffs under RICO and antitrust statutes, this Court has never considered the availability of tort claims to other plaintiffs, but has instead looked for more directly injured victims "whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement . . . ." *AGC,* 459 U.S. at 542. Conversely, because the Ninth Circuit implicitly equates tort claims with RICO and antitrust claims, it is comfortable with a result that leaves no plaintiffs with standing to pursue RICO or antitrust claims.

Petitioners respectfully submit that the Ninth Circuit is fundamentally mistaken on this point: tort claims will not do just fine. This Court should take this case to clarify that the availability of *tort actions* to other more directly affected victims of defendants' conduct is not grounds for denying standing to a party who sustained *RICO or antitrust injuries.* Particularly where denial of

standing on such grounds leaves no plaintiff to pursue RICO or antitrust claims, the result is antithetical to both this Court's holdings and congressional intent. The Ninth Circuit's approach leaves RICO and antitrust wrongs unremedied,[10] leaving individuals to pursue tort claims on a piece-meal basis. The tobacco cases dramatically demonstrate the inadquacy of such remedies in comparison to the remedies enacted by Congress for RICO and antitrust wrongs.

C. The Factors Previously Identified by this Court Weigh in Favor of Granting Standing to Petitioners.

Proper application of this Court's analysis weighs in favor of granting standing to the petitioner Public Hospital Districts:

Availability of other plaintiffs. The Ninth Circuit has made it clear that no other plaintiffs – not smokers, not third-party payors, not direct health care providers – are available to bring RICO or antitrust claims against respondents for their conspiracy to suppress the knowledge that smoking is a disease of addiction and the development of tools to treat it. The availability of tort claims to individual smokers is not a substitute for the potent remedy available to RICO and antitrust plaintiffs.

Difficulty in apportioning damages. In the present case there should be no difficulty whatsoever in apportioning damages because petitioners seek compensation only for health care actually provided for which smokers have not already reimbursed them. Indeed, the Ninth

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[10] By contrast, this Court has been concerned about leaving "a significant antitrust violation undetected or unremedied . . . ." *AGC*, 459 U.S. at 542.

Circuit's suggestion that there would be difficulty in apportioning damages among plaintiffs is curious given its ruling that no plaintiffs have standing to bring RICO or antitrust claims against respondents. Even the Third Circuit, which dismissed payors' claims, found that there is "little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs." *Steamfitters*, 171 F.3d at 928.

If there were any concern that petitioners' claims might result in duplicative recovery, such concerns are obviated by a clause in the Master Settlement Agreement between the states and respondents. Under this clause, respondents conceded in trial court briefs, any of petitioners' recoveries would come out of the fixed amount of Washington State's recovery. However, under the terms of that agreement, petitioners recover nothing unless they are found to have standing and ultimately recover on their claims.

On this particular point, the Public Hospital Districts note that their claims are not based on mere contractual obligations to pay for care provided by others. Judge Easterbrook of the Seventh Circuit noted:

> The [Union Trust] Funds and the Blues [Blue Cross/Blue Shield Plans] are just financial intermediaries. They collect the premiums and spend them to provide the contracted-for care; their books balance whether the costs of care are high or low. Smokers, employers, and other purchasers of insurance, not the Funds and the Blues, foot the medical bill in the end.

Teamsters, 196 F.3d at 824. By contrast, petitioners are health care providers statutorily required to provide care directly to patients from whom they did not receive compensation. Moreover, the Public Hospital Districts'

injuries were directly the result of tobacco defendants' conspiracy to suppress development of smoking cessation programs.

Difficulty in ascertaining damages. Having collusively deceived the world for decades about the addictive nature of their product, the Tobacco Firms now contend that the PHDs and others may not recover damages because it is too difficult to ascertain the precise among of damages in question:

> [t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But . . . it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 566-67 (1981) (citations omitted).

Foreseeability. The foreseeability of petitioners' harm strongly weighs in favor of granting standing. For many years respondents have known all too well precisely what the gruesome consequences of their ongoing misconduct would be:

> The foreseeable consequences of such conduct are obvious. Millions of people will develop the vast array of pulmonary, cardiovascular, and malignant conditions that Plaintiffs have alleged in their complaint. Those conditions will make extraordinary demands on the healthcare community.

Service Employees, 83 F. Supp. 2d at 85. Indeed, some of the respondents concluded that "costs associated with smoking and health are not social costs but transfer payments." Similarly, a Philip Morris document warned that "as health care costs rise astronomically, the oppo-

sition becomes armed with more potent weapons." *Steamfitters*, Petition for Certiorari at 8. Respondents also viewed health care providers such as petitioners as competition, since they knew effective smoking cessation programs could undermine their stranglehold on their customers.

Indeed, once the Public Hospital Districts learned smoking was a disease of addiction to be treated, and obtained the tools to treat it, they deployed smoking cessation programs. These programs, in turn, reduced the amount of care required to treat smoking illness. But for tobacco defendants' conspiracy, the Public Hospital Districts would have created such programs years earlier, and thus avoided millions of dollars in tobacco-related treatments.

Antitrust injury. Finally, the Ninth Circuit also dismissed petitioners' antitrust and Washington Consumer Protection Act ("CPA") claims on the ground that petitioners suffered no antitrust injury or injury to their business within the meaning of the CPA. Yet this case is remarkably similar to *McCready*, where the district court also denied standing on the grounds that plaintiff's injury was too "indirect and remote to be considered 'antitrust injury.' " *McCready*, 457 U.S. at 470-71. This Court disagreed with the district court's dismissal:

> The harm to McCready and her class was clearly foreseeable . . . . [T]here can be no question but that the loss was precisely "the type of loss that the claimed violations would be likely to cause."
>
> . . .
>
> Although McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators

> sought to inflict on psychologists and the psychotherapy market.

Id. at 479 (internal citations omitted).

Considered together, these factors strongly weigh in favor of finding that respondents' misconduct proximately caused injury to petitioners.

D. The RICO and Antitrust Standing Issues Have Divided Courts Throughout the Country.

No explicit conflict exists among the circuits on the questions presented. That is the only judicial level at which an explicit conflict on these issues does not exist.

Numerous federal district courts have reached contrary conclusions than the circuit courts. For example, the District Court for the District of Columbia concluded:

> If Plaintiffs can ultimately prove their allegations, can there really be any doubt that sound public policy demands that they be given an opportunity to do so? To close the courthouse door to them, in light of the magnitude of the harm alleged and the moral turpitude of the conduct alleged, would be a far cry from the "rough sense of justice" that Justice Andrews recognized as part of the proximate cause equation so long ago in *Palsgraf.*

Service Employees, 83 F. Supp. 2d at 84-85 (footnotes and internal citations omitted), *reversed,* 2001 WL 535977, *5, *7-*8 (D.C. Cir. 2001) (relying in part on the Ninth Circuit's analysis). *See also Texas v. American Tobacco Co.,* 14 F. Supp. 2d 956, 968 (E.D. Tex. 1997) ("having considered the concerns of *Holmes,* the policy underlying the requirement of proximate cause, and the nature of this suite as a whole, the injury allegedly incurred by the State is not sufficiently remote to warrant dismissal"); *Iron Workers Local Union No. 17 v.*

Philip Morris, Inc., 23 F. Supp. 2d 771, 791 (N.D. Ohio 1998) ("plaintiffs' injuries are distinct from the personal injury claims of smokers. Plaintiffs have sufficiently stated RICO's injury element"); *Arkansas Blue Cross and Blue Shield v. Philip Morris, Inc.*, 1999 U.S. Dist. LEXIS 4573 at *6 (N.D. Ill. 1999), *reversed, Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999) (plaintiffs are only ones who "can claim the injury to business or property required by the RICO statute").

Many state courts that have opined on the questions presented here also conflict with the holdings of the federal circuit courts. For example, one Florida trial court declared that the allegations at the heart of this lawsuit "would seem to make out a case for 'the mother of all RICO actions.' " *Florida v. American Tobacco Co.*, No. CL95-1466, slip op., 1996 WL 788371, *4 (Fla. Cir. Court. Dec. 13, 1996). The Minnesota Supreme Court recognized standing under a somewhat broader state antitrust statute, but noted that it would have found standing "[e]ven absent the statutory grant of authority in the antitrust statute." *Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490, 497 n.1 (Minn. 1996). Although the specific nature of some of the states' claims differs, numerous state courts found the states had standing to sue for at least some cause of action, despite the absence of a "direct link" between defendants' conduct and plaintiffs' harm. *See Steamfitters*, 171 F.3d at 937-38 (appendix summarizing decisions).

Commentators have also harshly criticized the circuit court decisions. According to one author, "[T]he circuits courts are engaging in an improper proximate cause analysis by . . . misapplying the policy-based methodology to deselect all plaintiffs instead of to select the best enforcer of RICO." Notre Dame L. Rev.

at 259. Another contends the decisions of the Ninth Circuit and its counterparts "essentially applied an artificial privity requirement unsupported by precedent." Christopher B. Durbin, *To Say the Greatest Matters in the Simplest Way: A First Economic Injury Rule as a Restatement of Directness Standing Requirements in Federal Antitrust Law*, 75 Wash. L. Rev. 549, 571 (April 2000).

Finally, this Court should take judicial notice of the practical conflict these divergent opinions have created: states (including the state of Washington), recovered billions of dollars through their litigation, while entities such as petitioners (political subdivisions of the state of Washington with separate legal standing) — who collectively incurred even great costs — have been judicially barred from recovering any relief. Consequently, such entities are justified in asking whether they are truly so differently situated from state payors that they do not deserve a day in court.[11]

IX. CONCLUSION

Whether the Tobacco Companies have wrought some terrible injustices on our society is a relatively easy question. The more difficult questions are whether the federal judiciary system is the forum and whether public providers are suitable plaintiffs for remedying those

[11] The Third Circuit acknowledged that there is "arguably a tension between our decision here that the tobacco companies cannot be held liable for the damages suffered by entities that paid for smoking-related illnesses, and the fact that these same tobacco companies recently agreed to pay more than $200 billion to settle claims brought by attorneys general for the states' similar costs of their citizens' smoking-related illnesses." *Steamfitters*, 171 F.3d at 934 n.18.

injustices. It may be tempting to evade these issues – to conclude that there has been enough litigation, that the states have obtained their pound of flesh and it is time to move on – without this Court ever weighing in on the questions.

But Justice Thomas and Justice Kennedy suggest that is not the tradition of this Court. It is when this Court addresses such difficult questions squarely that it is "truly the Court." When the first party to suffer cognizable RICO and antitrust injuries is not the first victim in the causal chain, does no one have standing to pursue relief under these potent federal statutes? When some of this nation's most powerful corporations conspire and defraud in a way that results in millions of deaths and billions of dollars in corresponding health care costs, are we willing to rely on tort suits by individuals to deter the racketerring and conspiratorial misconduct prohibited by RICO and the Sherman Act? Was Mark Twain right when he observed, through his other character Tom Sawyer: "The wronger a conspiracy is, the better it is?"

These are difficult quetions. These are questions worthy of this Court's review.

Respectfully submitted,

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July 16, 2001